

1
2
3
4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 CHRISTINA L.,

7 Plaintiff,

CASE NO. C19-0142-MAT

8 v.

9 ANDREW M. SAUL,
Commissioner of Social Security,

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

10 Defendant.
11

12 Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of
13 the Social Security Administration (Commissioner). The Commissioner denied plaintiff's
14 application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law
15 Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all
16 memoranda of record, this matter is REMANDED for further administrative proceedings.

17 **FACTS AND PROCEDURAL HISTORY**

18 Plaintiff was born on XXXX, 1970.¹ She has a high school education (AR 23, 35-36) and
19 previously worked as a waitress, bartender, gambling dealer, and medical assistant (AR 23).

20 Plaintiff filed an application for DIB in September 2015, alleging disability beginning July
21 9, 2014. (AR 89.) The application was denied at the initial level and on reconsideration.

22 On November 2, 2017, ALJ Wayne N. Araki held a hearing, taking testimony from plaintiff
23

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 and a vocational expert. (AR 31-73.) On March 29, 2018, the ALJ issued a decision finding
2 plaintiff not disabled from July 9, 2014, through the date of the decision. (AR 15-25.)

3 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
4 November 27, 2018 (AR 1-3), making the ALJ's decision the final decision of the Commissioner.
5 Plaintiff appealed this final decision of the Commissioner to this Court.

6 **JURISDICTION**

7 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

8 **DISCUSSION**

9 The Commissioner follows a five-step sequential evaluation process for determining
10 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
11 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
12 engaged in substantial gainful activity since the alleged onset date. At step two, it must be
13 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
14 degenerative disc disease, joint dysfunction, sprains and strains and muscle/soft tissue disorder
15 severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The
16 ALJ found that plaintiff's impairments did not meet or equal the criteria of a listed impairment.

17 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
18 residual functional capacity (RFC) and determine at step four whether the claimant has
19 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform
20 sedentary work except she could lift and carry 10 pounds occasionally; stand and walk for 10 to
21 15 minute intervals up to two hours total per day; sit for eight hours per day total; occasionally
22 climb ramps and stairs but never ladders, ropes, and scaffolds; occasionally balance, stoop, kneel,
23 crouch and crawl; occasionally reach overhead; and frequently finger and handle. She could have

1 occasional exposure to extreme cold or vibrations; could not work at exposed heights or operating
2 heavy equipment; and otherwise could have occasional exposure to hazards. With that assessment,
3 the ALJ found plaintiff unable to perform her past relevant work.

4 If a claimant demonstrates an inability to perform past relevant work, or has no past
5 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
6 retains the capacity to make an adjustment to work that exists in significant levels in the national
7 economy. With the assistance of a VE, the ALJ found plaintiff capable of performing other jobs,
8 such as work as a touch up screener, document preparer, and table worker.

9 This Court's review of the ALJ's decision is limited to whether the decision is in
10 accordance with the law and the findings supported by substantial evidence in the record as a
11 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993); *accord Marsh v. Colvin*, 792 F.3d
12 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
13 by substantial evidence in the administrative record or is based on legal error.") Substantial
14 evidence means more than a scintilla, but less than a preponderance; it means such relevant
15 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
16 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of
17 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
18 F.3d 947, 954 (9th Cir. 2002).

19 Plaintiff argues error in relation to the medical evidence and her symptom testimony. She
20 requests remand for further administrative proceedings. The Commissioner argues the ALJ's
21 decision has the support of substantial evidence and should be affirmed.

22 Symptom Testimony

23 Absent evidence of malingering, an ALJ must provide specific, clear, and convincing

1 reasons to reject a claimant's subjective symptom testimony. *Burrell v. Colvin*, 775 F.3d 1133,
2 1136-37 (9th Cir. 2014). "General findings are insufficient; rather, the ALJ must identify what
3 testimony is not credible and what evidence undermines the claimant's complaints." *Lester v.*
4 *Chater*, 81 F.3d 821, 834 (9th Cir. 1996). In considering the intensity, persistence, and limiting
5 effects of a claimant's symptoms, the ALJ "examine[s] the entire case record, including the
6 objective medical evidence; an individual's statements about the intensity, persistence, and
7 limiting effects of symptoms; statements and other information provided by medical sources and
8 other persons; and any other relevant evidence in the individual's case record." Social Security
9 Ruling (SSR) 16-3p.²

10 Plaintiff testified that she can stand only 20 minutes before her feet and back hurt. She
11 could not be on her feet more than two hours total per day. She is being treated for depression.
12 She must urinate at least hourly, including during the night. After just five minutes of housework
13 her hands are numb and tingling. The ALJ incorporated her standing limitations into the RFC but
14 imposed no mental limitations and no limitation related to urinary frequency, and only limited
15 handling and fingering to frequently (*i.e.*, two-thirds of the day). (AR 19.)

16 The ALJ found plaintiff's statements concerning the intensity, persistence, and limiting
17 effects of her symptoms not entirely consistent with the medical and other evidence in the record.
18 He found inconsistency with plaintiff's activities. (AR 22 (pointing to preparing simple meals,
19 shopping, driving, washing laundry with assistance carrying the basket, sweeping, and maintaining
20 personal hygiene).) The ALJ also pointed to plaintiff's receipt of unemployment benefits for nine
21

22 ² Effective March 28, 2016, the Social Security Administration (SSA) eliminated the term
23 "credibility" from its policy and clarified the evaluation of a claimant's subjective symptoms is not an
examination of character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term
credibility.

1 months after the alleged onset date, unclear reasons for leaving her last job, failure to follow
2 treatment recommendations, and a provider's opinion that plaintiff should return to work. (AR
3 22.) The ALJ also found plaintiff's testimony was not fully supported by the medical record. (AR
4 20, 22.)

5 An ALJ may discount a claimant's testimony based on daily activities that contradict her
6 testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). Here, however, no contradiction was
7 shown. Plaintiff only cooks for 15 to 20 minutes at a time because she cannot stand longer. (AR
8 51.) She waits for her sons to come home before starting to cook dinner so that they can help her.
9 (AR 57.) Her sons help her with any housekeeping she is not able to do. (AR 52.) The
10 Commissioner does not defend the ALJ's reliance on activities and thus appears to concede that it
11 was invalid.

12 The ALJ discounted plaintiff's testimony because she was not fired from her last job,
13 working as a waitress, for inability to perform her duties. (AR 22.) However, the record shows
14 plaintiff quit her job because she was unable to perform her duties. (AR 36.) This supports, rather
15 than undermines, her testimony. The Commissioner does not defend the ALJ's reasoning and thus
16 appears to concede that plaintiff's reason for leaving her last job was not a clear and convincing
17 reason to discount her testimony.

18 Receipt of unemployment benefits can undermine a claimant's testimony if it shows an
19 ability to perform full-time work, inconsistent with disability allegations. *Carmickle v. Comm'r,*
20 *Soc. Sec. Admin.*, 533 F.3d 1155, 1161-62 (9th Cir. 2008). Plaintiff acknowledged that in receiving
21 unemployment benefits she was representing that she could work. (AR 46-47.) She was required
22 to apply for jobs, and she applied for waitress jobs. The ALJ asked if she could have performed
23 waitressing jobs, and plaintiff replied, "No, but I don't have any other choice. I don't know how

1 to do anything else.” (AR 46.) The ALJ asked if she could have done other work if offered a job,
2 and plaintiff replied, “Yes, I do it if I have to.” (AR 47.) In context, plaintiff’s answers indicate
3 that she would have tried to work, but do not indicate that she believed she could sustain full time
4 employment. In these circumstances, receipt of unemployment benefits was not a clear and
5 convincing reason to discount plaintiff’s testimony.

6 An “unexplained or inadequately explained failure” to seek treatment or follow prescribed
7 treatment can be a valid reason to discount a claimant’s testimony, but an ALJ must consider a
8 claimant’s proffered reasons. *Trevizo v. Berryhill*, 871 F.3d 664, 679-80 (9th Cir. 2017). Plaintiff
9 declined medication for her urinary symptoms because she had tried it before and it did not work.
10 (AR 44.) Plaintiff declined surgery because her first surgery did not relieve her symptoms and she
11 was afraid of having another surgery. (AR 43.) The ALJ did not address or even mention these
12 reasons. (See AR 21.) On remand the ALJ must consider plaintiff’s proffered reasons.

13 An ALJ may reject the claimant’s symptom testimony based on contradiction by the
14 medical evidence, but not mere lack of supporting medical evidence. See *Carmickle*, 533 F.3d at
15 1161; *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). Here, the ALJ did not identify any
16 contradiction with the medical record. He pointed to some benign findings such as normal deep
17 tendon reflexes and independent ambulation, as well as some abnormal findings such as antalgic
18 gait and decreased range of motion in the feet, shoulders, neck, and spine, but did not explain how
19 any of these findings contradict plaintiff’s testimony. (AR 20.) Contradiction by medical evidence
20 was not a clear and convincing reason to discount plaintiff’s testimony.

21 Plaintiff saw an osteopathic doctor, Suzanne M. Laurel, D.O., on one occasion. Dr. Laurel
22 concluded that plaintiff’s “significant back pain” had a “strong psychologic component,” and
23 included “return to work” as one of several “therapeutic recommendations.” (AR 764.) The ALJ

1 concluded that Dr. Laurel's belief that plaintiff was able to work undermined plaintiff's
2 allegations. (AR 22.) The Social Security disability determination includes both medical and
3 vocational components. Medical training does not equip a provider with vocational expertise.
4 Accordingly, a medical source's opinion of disability or non-disability is not conclusive. 20 C.F.R.
5 § 404.1527(d)(1); *cf. Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993) (although an ALJ is
6 not bound by the "opinions of the claimant's physicians on the ultimate issue of disability, ... he
7 cannot reject them without presenting" legally sufficient reasons for doing so); *see* SSR 96-5p
8 ("[T]he regulations provide that the final responsibility for deciding issues such as [whether an
9 individual is 'disabled'] is reserved to the Commissioner."). In this case, Dr. Laurel did not specify
10 that she believed plaintiff could perform full time work, on a sustained basis, to fulfill her
11 therapeutic recommendation. And even if plaintiff's physical pain had a psychological
12 component, disability may be based on "physical or mental" impairments. 20 C.F.R.
13 § 404.1505(a). Under these circumstances, Dr. Laurel's recommendation that plaintiff return to
14 work was not a clear and convincing reason to discount her testimony.

15 The ALJ should reconsider plaintiff's testimony on remand.

16 Step Two

17 At step two, a claimant must make a threshold showing that her medically determinable
18 impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*,
19 482 U.S. 137, 145 (1987); 20 C.F.R. § 404.1520(c). A medically determinable impairment can
20 only be established by objective medical evidence "shown by medically acceptable clinical and
21 laboratory diagnostic techniques" from an acceptable medical source, and not simply by a
22 diagnosis or medical opinion. 20 C.F.R. § 404.1521.

23 Plaintiff argues that the ALJ erred by failing to find her carpal tunnel syndrome, anxiety,

1 PTSD, and depression severe. Plaintiff fails to identify clinical or laboratory diagnostic techniques
2 establishing anxiety, PTSD, or depression. However, plaintiff does point to a March 16, 2016
3 electrodiagnostic study by Ashish Trivedi, M.D., showing “[m]oderately [s]evere left median
4 neuropathy at the left wrist (CTS).” (AR 663.) The ALJ did not address this evidence of carpal
5 tunnel syndrome, despite plaintiff’s attorney pointing it out during the hearing. (See AR 34 (“She
6 has carpal tunnel in the left wrist characterized as moderately severe, left median neuropathy at
7 the left wrist which was documented by an EMG dated March 16, 2016.”).) An ALJ may not
8 reject “significant probative evidence” without explanation. *Flores v. Shalala*, 49 F.3d 562, 571
9 (9th Cir. 1995). On remand, the ALJ must address the evidence associated with carpal tunnel
10 syndrome.

11 Medical Opinions and Other Evidence

12 The ALJ is responsible for assessing the medical evidence and resolving any conflicts or
13 ambiguities in the record. See *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th
14 Cir. 2014); *Carmickle*, 533 F.3d at 1164. When evidence reasonably supports either confirming
15 or reversing the ALJ’s decision, the court may not substitute its judgment for that of the ALJ.
16 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

17 In general, more weight should be given to the opinion of a treating doctor than to a non-
18 treating doctor, and more weight to the opinion of an examining doctor than to a non-examining
19 doctor. *Lester*, 81 F.3d at 830. Where not contradicted by another doctor, a treating or examining
20 doctor’s opinion may be rejected only for “‘clear and convincing’” reasons. *Id.* (quoted source
21 omitted). Where contradicted, the opinion may not be rejected without “‘specific and legitimate
22 reasons’ supported by substantial evidence in the record for so doing.” *Id.* at 830-31 (quoted source
23 omitted).

1 Plaintiff argues the ALJ erred in discounting the opinions of treating doctor Lilian X. Wu,
2 M.D., and erred in assigning significant weight to the conflicting opinions of non-examining state
3 agency doctor Greg Saue, M.D.

4 A. Dr. Lilian Wu

5 The ALJ gave only partial weight to Dr. Wu's December 2015 opinion limiting plaintiff to
6 only low-stress jobs; sitting only 30 minutes at a time, followed by walking for one minute;
7 standing or walking less than two hours total per day; shifting at will from sitting to standing or
8 walking; taking 15 to 20 unscheduled one-minute breaks per day; lifting less than 10 pounds
9 occasionally; twisting occasionally; stooping and crouching rarely; handling 2% of the day,
10 fingering 5% of the day, and reaching 2% of the day; and missing more than four days per month.
11 (AR 483-85.) Dr. Wu also opined that plaintiff's pain would interfere with her attention and
12 concentration frequently. (AR 483.)

13 The ALJ found Dr. Wu's opinion inconsistent with the treatment notes in the record, which
14 did not show sufficiently extreme abnormalities to support an absentee rate of more than four days
15 per month. (AR 21.) The ALJ also discounted Dr. Wu's opinions because her treatment "focused
16 primarily on the claimant's mental health" and Dr. Wu rarely performed physical examinations.
17 (AR 22.) An ALJ is permitted to discount a doctor's opinion that is inconsistent with her own and
18 other medical examiners' reports. *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601-02
19 (9th Cir. 1999).

20 Plaintiff does not identify any error in the ALJ's analysis. Instead, she argues that the ALJ
21 erred by failing to find carpal tunnel syndrome, anxiety, PTSD, and depression severe. This has
22 no relevance to Dr. Wu's opinions, which do not contain any of those diagnoses. (*See* AR 482-
23 85.)

1 The ALJ explicitly rejected Dr. Wu's opinion of four absences per month. (See AR 21-
2 22). Plaintiff argues, however, that the ALJ "does not state any reason for rejecting" other specific
3 limitations such as 30 minutes sitting or shifting at will between sitting, standing, and walking.
4 Failure to either incorporate a limitation or provide reasons to reject it is error. See *Garrison v.*
5 *Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) ("Where an ALJ does not explicitly reject a medical
6 opinion ..., he errs."). The reasons the ALJ gave—inconsistency with her own and other
7 providers' treatment notes—may apply to all the limitations in Dr. Wu's opinion that the ALJ
8 rejected. However, since the case must be remanded for reconsideration of step two and plaintiff's
9 testimony, the ALJ should also clarify his assessment of Dr. Wu's opinion.

10 B. Dr. Greg Saue

11 The ALJ gave significant weight to Dr. Saue's March 24, 2016 opinion that plaintiff could
12 perform sedentary work full time. Plaintiff contends Dr. Saue's opinion is entitled to little weight
13 because he was a non-examining physician and because he did not review any evidence beyond
14 March 2016. Dr. Saue was apparently not aware of the March 16, 2016 left wrist CTS results.
15 (See AR 97-99.) Because the ALJ must review his assessment of Dr. Wu's conflicting opinion,
16 the ALJ may need to reconsider his assessment of Dr. Saue's opinion.

17 **CONCLUSION**

18 For the reasons set forth above, this matter is REMANDED for further administrative
19 proceedings.

20 DATED this 18th day of November, 2019.

21 
22 _____
23 Mary Alice Theiler
United States Magistrate Judge